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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Part 95 of the Commission's
Rules to Provide Regulatory Flexibility in the
218-219 MHZ Service

WT Docket No. 98-169
RM-8951

Amendment of Part 95 of the Commission's
Rules to Allow Interactive Video and Data
Service Licensees to Provide Mobile Services

WT Docket No. 95-47
RM-8476
(proceeding terminated)

To: The Commission

**Comments of
MKS Interactive, Inc.
Cleveland, Ohio**

Status of MKS

MKS Interactive, Inc. ("MKS"), pursuant to the Federal Communications Commission's *Notice of Proposed Rule Making* ("NPRM") in the above captioned matter, hereby submits comments on the Commission's various proposals under consideration. MKS currently holds three licenses in the 218-219 MHZ Service as a result of its participation in the Commission's first Interactive Video Data Service (IVDS) auction in July 1994. As such, MKS has a direct interest in actions that the Commission may be contemplating that could change the nature of the service.

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Background

1. TV Answer, Inc. (a.k.a.Eon Corp.) filed a Petition for Rule-Making with the FCC seeking the allocation of radio spectrum to operate a “so called” Interactive Video and Data Service. The filing was originally made on December 7, 1987, and was supplemented from time to time.

2. The FCC adopted rules authorizing the IVDS service on February 13, 1992, however, no fully operational and commercial trials were conducted by TV Answer or any other proponent of the frequency use as had been done in FM, Cellular, Paging, PCS and others. No operating experience or technical standards were established and the system was flawed at the outset.

3. The auction was concluded in July 1994 with MKS and probably all other Licensees believing that a proven, uniform and commercially viable IVDS system was immediately available for purchase in order to begin service to the public after license grant.

4. Following the July 1994 auction, TV answer and at least one other system supplier, touted their respective systems and each “projected” system cost, “projected” equipment delivery dates and “projected” commercially viable systems in operation.

5. Notwithstanding the state of IVDS developments currently underway by several companies, there are no commercially viable systems in operation today.

6. MKS, and others were attracted to the IVDS Auction by advertisements placed in the Wall Street Journal by the FCC. MKS and others entered the auction

believing that the FCC had, after five years of deliberation and presumed testing, set aside frequencies capable of commercial exploitation, MKS further believed that since the FCC had type accepted the TV Answer equipment, systems were readily available for purchase and installation. MKS further believed that TV Answer was ready, willing and able to deliver commercially ready systems for use by the public. It turns out that the TV Answer system was not ready and commercially available in July 1994 and the company ceases to exist. The IVDS Auction is therefore, a non-starter, and should, in all fairness, be reversed for all those licensees wishing to do so. The simple fact is that the FCC touted and sold IVDS licenses to the public which were not commercially viable at the time of the sale and are still not viable. To think that the U.S. government would require its citizens to pay for a commercially useless spectrum of licenses is unconscionable.

7. Thus far MKS has paid the twenty percent (20%) down payment amount plus interest totaling over \$90,000 and is not in default. Investment bankers, venture capitalists and commercial banks were (and still are) unwilling to lend or invest any money into IVDS, which forced MKS and many others to timely file numerous grace period requests due to lack of funds.

8. The lack of available funding is a proxy for the total failure of the IVDS endeavor. The spectrum limitations, technological advances and the explosion of the prevalence of internet use since 1994 all militate to demonstrate the total lack of commercial viability. Capital is not and will not be available.

Comments

9. The Commission proposes a relaxation of its rules to permit a Licensee to operate the licenses in CMRS or PMRS, commercial mobile or some variation. We agree and urge the Commission to relax its rules to permit a Licensee to provide any commercial service possible given the limited amount of spectrum. MKS believes that even with a total relaxation of the rules that most Licensees will consider the IVDS service a non-starter, which is permanently and indelibly tainted by the passage of time, scandal and a deficient amount of spectrum to be commercially viable.

10. MKS agrees with the proposition that the Licensee term should be extended so as to promote regulatory parity - a fundamental fairness issue that should not require any further argument.

11. The Commission proposes extending the payment terms out to 10 years and we agree. However we urge the Commission to extend the interest only period to four years instead of two since it will be difficult for any operator to get started at best (if at all) and they will need the extra time. After all, its taken four years of begging and pleading to get the Commission to react as it has.

12. The Commission proposes an amnesty program and we agree, but with some changes. The Amnesty Program should be on at least a parity with other amnesty programs. The C Block PCS program as an example, requires a Licensee seeking amnesty, to forfeit the 10% down payment and not a 20% down payment as is proposed here. Fundamental fairness concepts and equal protection of the law doctrine compel a

modification of the proposed rule. At very least, an applicant for the amnesty program should receive a return in full of any interest paid plus a full refund of any excess funds deposited over the amount of the forfeiture.

13. MKS believes that in view of the initially flawed rules, in view of the lack of equipment, and in view of the amount of time which has passed without any positive action from our government that the forfeiture amount should be lower than 10%. We propose that the amount be set at \$2500 per applicant which sum was the amount of the initial up front payment required to be eligible to bid at the auction. We further propose that the Commission promptly refund to each Licensee (without interest) all payments made in excess of \$2500.

14. The sheer passage of time dictates that the Commission act fairly. Over four years have passed since the lottery. Everyone has changed circumstances and to expect Licensees to re-start their flawed business plans is really unreasonable and really unfair. Everyone should be able to get most of their money back.

15. MKS believes the license turn back or amnesty program should be available to all Licensees so long as they paid the initial 20% down payments as were originally required. The Commission is urged to include all Licensees in the refund program regardless of whether or not they paid any interest, paid some interest, or paid everything up front. The entire process was flawed from the beginning. No Licensee wishing to walk away from IVDS and return the licenses should be treated differently. The fact that some Licensees failed to timely file requests for a grace period should not disqualify them

from getting a refund. So much time has passed without any apparent concern at all for the plight of the Licensees coming from the FCC, that its natural to expect that many Licensees would consider themselves “beaten” and just quit. Please don’t penalize any Licensee who at very least made their down payments.

16. The Commission is urged to adopt an amnesty, license turn back program as suggested here, namely, that any Licensee who paid the initial down payment may elect to return all licenses (and refrain from bidding on or otherwise acquiring those licenses in future auctions) and forfeit the initial \$2500 up front deposit paid, each Licensee so electing would receive a refund of all other payments made whether down payments, license fees or interest paid.

17. We urge the Commission to adopt a requirement that all Licensees wishing to retain their Licensees, enter into a written agreement with the FCC detailing the terms, conditions, and risk factors containing proper notes and security documents so that the Licensee will know exactly the terms, conditions and risks associated with the endeavor.

Conclusion

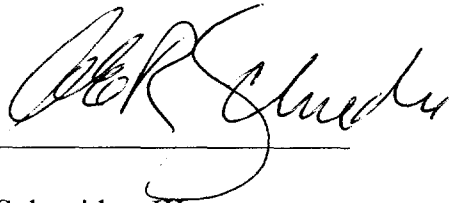
MKS commends the Commission for finally acting to rectify the problems in this service. MKS urges the Commission to relax all technical restrictions and to create a non discriminatory license surrender / amnesty program which applies to all Licensees who paid at least the required down payment (or more) and limit the cash forfeiture to \$2500 per Licensee and promptly refund the balance.

By giving the Licensees the option to choose, the Commission does not have to

deal with the issue of whether the IVDS service is a non starter. Let those who have put up the money make the decision.

Respectfully submitted

MKS Interactive, Inc.

By: 

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Assistant Secretary
and Legal Counsel